





## **Singh (Migration) [2022] AATA 4755 (15 December 2022)**

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### **DECISION RECORD**

|                                   |                                                                                                       |
|-----------------------------------|-------------------------------------------------------------------------------------------------------|
| <b>DIVISION:</b>                  | Migration & Refugee Division                                                                          |
| <b>APPLICANT:</b>                 | Mr Bikramjit Singh                                                                                    |
| <b>REPRESENTATIVE:</b>            | Ms Diana Xidan Tong (MARN: 9359088)                                                                   |
| <b>CASE NUMBER:</b>               | 2000200                                                                                               |
| <b>HOME AFFAIRS REFERENCE(S):</b> | BCC2019/3339837                                                                                       |
| <b>MEMBER:</b>                    | Andrew McLean Williams                                                                                |
| <b>DATE:</b>                      | 15 December 2022                                                                                      |
| <b>PLACE OF DECISION:</b>         | Brisbane                                                                                              |
| <b>DECISION:</b>                  | The Tribunal affirms the decision not to grant the applicant an Employer Nomination (Permanent) visa. |

Statement made on 15 December 2022 at 11:34am

### **CATCHWORDS**

*MIGRATION – Employer Nomination (Permanent) (Class EN) visa – Subclass 186 (Employer Nomination Scheme) – bogus document – English test result – compassionate or compelling circumstances – strong ties with local community – impact on the employer’s business – decision under review affirmed*

### **LEGISLATION**

*Migration Act 1958, ss 5(1), 65*  
*Migration Regulations 1994, Schedule 2, cl 186.213; Schedule 4, Public Interest Criterion 4020; r 1.03*

### **CASES**

*Arora v MIBP [2016] FCAFC 35*  
*Batra v MIAC [2013] FCA 274*  
*Kaur v MIBP [2017] FCAFC 184*  
*Plaintiff M64/2015 v MIBP [2015] HCA 50*  
*Trivedi v MIBP [2014] FCAFC 42*

## STATEMENT OF DECISION AND REASONS

### APPLICATION FOR REVIEW

3. This is an application for review of a decision made by a Delegate of the Minister for Home Affairs on 19 December 2019 refusing to grant the Applicant an Employer Nomination (Permanent) visa under s 65 of the *Migration Act 1958* (Cth) ('the Act').
4. The Applicant applied for the visa on 3 July 2019. The Delegate refused to grant the visa on the basis that the Applicant did not satisfy the requirements of cl.186.213 of Schedule 2 to the *Migration Regulations 1994* (Cth) ('the Regulations') because he did not satisfy Public Interest Criteria ('PIC 4020') as required by cl.186.213(1).
5. PIC 4020 requires that there be no evidence that the Applicant has given, or caused to be given, information that is false or misleading in a material particular, or a bogus document in relation to the visa application; or in relation to a visa held by the Applicant in the 12 months prior to the current visa application.
6. It became apparent to the Department that an IELTS (English language proficiency) Test result supplied to the Department on 3 July 2019 in support of the Applicant's visa application may have been a fabricated document, given that the reference number on the supplied test result returned the name of a different person. The Applicant was provided with an opportunity to comment on that, on 6 November 2019. The Applicant did respond to that opportunity by his providing a statutory declaration dated 4 December 2019.
7. On 19 December 2019 a Delegate of the Minister determined that the Applicant had supplied a bogus document, contrary to PIC 4020, and that there were neither (a), compelling circumstances that affect the interests of Australia; or (b), compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen. Accordingly, the Delegate determined that clause 186.213 had not been satisfied, and the Applicant was ineligible for a visa. This is the decision now under review before the Tribunal.
8. The Applicant appeared before the Tribunal on 15 December 2022 at 11.00am AEST. No further documents or evidence were provided to the Tribunal, beyond those documents previously supplied by him as part of his natural justice response to the Department.
9. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

### CONSIDERATION OF CLAIMS AND EVIDENCE

10. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl 186.213 for the grant of the visa. Broadly speaking, this requires that:
  - there be no evidence that the Applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a 'bogus document' or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the Applicant held in the 12 months before the application was made: PIC 4020(1); and
  - the Applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years

before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and

- the Applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
- neither the Applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).

11. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

**Has the Applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?**

12. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s 5(1) of the Act (see the **attachment** to this decision).
13. In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of 'bogus document' to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
14. The requirement in PIC 4020(1) to not provide a bogus document, or false or misleading information, applies irrespective whether the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the Applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the Applicant either knowingly, or unwittingly.
15. While PIC 4020 refers to information that is false - in the sense of purposely untrue - it is not necessary for the Minister (or the Tribunal on review) to conclude that the Applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
16. On 6 November 2019 the Department wrote to the Applicant advising that Test Number 17IN364151TJ855A were apparently the results from another candidate. The Applicant was invited to provide comment on that before that provisional conclusion was made absolute.
17. The Applicant did respond to that natural justice invitation by way of a statutory declaration dated 4 December 2019, yet did not thereby seek to contest the primary allegation that the IELTS test result was a bogus document. Similarly, during his appearance before the Tribunal on 15 December 2022 the Applicant did not seek to contend that the IELTS Test result was in fact a genuine document.
18. Therefore, the Tribunal is satisfied that the Applicant provided a bogus document, and as such that the Applicant does not meet PIC 4020(1).

### **Should the requirements of PIC 4020(1) or (2) be waived?**

19. The requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in reg 1.03), that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.
20. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.
21. For the following reasons, the Tribunal is not satisfied that the requirements should be waived.
22. In his statutory declaration dated 4 December 2019 the Applicant avers that he came to Australia in 2009 and has been working in Australia since then as a cook, in an Italian restaurant. The Applicant claims to have developed strong ties with his local community and to have become an important employee in his employer's business. The Applicant remits money home to support his elderly mother in India; attends his local Sikh Temple in Sydney weekly, and makes a monthly \$50 donation to the Cancer Council.
23. In the Tribunal's view these things – and no matter whether these are assessed singly or collectively - are not now sufficient to enable the Tribunal to be satisfied that the Applicant has raised either 'compelling circumstances' impacting the interests of Australia, or 'compassionate or compelling circumstances', impacting the interests of an Australian citizen, permanent resident or eligible New Zealand citizen.
24. Therefore, the requirements of PIC 4020(1) should not be waived.
25. On the basis of the above, the Applicant does not satisfy PIC 4020 for the purposes of cl 186.213.

### **DECISION**

26. The Tribunal affirms the decision not to grant the applicant an Employer Nomination (Permanent) visa.

Andrew McLean Williams  
Member

## ATTACHMENT

### Migration Regulations 1994

#### Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
  - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
  - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
  - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
  - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is *false or misleading in a material particular* means information that is:
- (a) false or misleading at the time it is given; and
  - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

## ***Migration Act 1958***

### **s 5 Interpretation**

(1) In this Act, unless contrary intention appears:

...

***bogus document***, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...